SANDRA MARGARET BIRCH v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Agil Barakbah J.) January 6, 1977]

[Penang — Criminal Appeal No. 117 of 1976]

Criminal Law & Procedure — Confession — Evidence of discovery — Witness not called — Adverse inference.

This was an appeal against the decision of the learned President who convicted the appellant and sentenced her to six years' imprisonment. The appellant was charged for possession of dangerous drug, to wit, heroin weighing 92.910 grammes, an offence under section 12(2) and punishable under section 39A of the Dangerous Drug Ordinance, 1952.

Held: (1) the trial President should have cautioned himself that statements or confessions are not always true and that they must be checked in the light of the whole evidence on the record in order to see if they carry conviction;

(2) it is an accepted principle that there is no duty upon an accused person to call in evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him could be drawn because he adopted one course rather than the other.

Cases referred to:-

(1) *Tai Chai Keh* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 105.
(2) *Chandrasekaran & Ors.* v. *Public Prosecutor* [1971] 1 M.L.J. 153, 158.
(3) *Abu bin Hussin* v. *Public Prosecutor* [1959] M.L.J. 5.
(4) *Yaacob* v. *Public Prosecutor* [1966] 1 M.L.J. 67.
(5) *White* v. *The King* A.I.R. 1945 P.C. 181.
(6) *Balasingham* v. *Public Prosecutor* [1959] M.L.J. 193.
(7) *Goh Ah Yew* v. *Public Prosecutor* [1949] M.L.J. 150, 153.
(8) *Abu Bakar* v. *Regina* [1963] M.L.J. 288, 289.
(9) *Tan Foo Su* v. *Public Prosecutor* [1967] 2 M.L.J. 19.
(10) *Roslan bin Karim & Ors.* v. *Public Prosecutor* [1975] 1 M.L.J. 84.

CRIMINAL APPEAL.

Karpal Singh (*K. Kumaraendran* and *S.P. Annamalai* with him) for the appellant.

Ghazi bin Ishak for the respondent.

Syed Agil Barakbah J.: This is an appeal against the decision of the learned President, Sessions Court, Penang, who convicted the appellant and sentenced her to six years' imprisonment. The appellant was charged for possession of a dangerous drug, to wit, heroin, weighing 92.910 grammes at about 5.30 p.m. on April 5, 1976, at premises No. 192, Mukim 17, Batu Ferringhi, Penang, an offence under section 12(2) and punishable under section 39A of the Dangerous Drugs Ordinance No. 30/52.

The brief facts adduced by the prosecution were that on April 5, 1976, at about 4.10 p.m. Inspector Latiff (PW2) while driving his car along Magazine Road, Penang, accompanied by Sgt. Yeoh (PW1), stopped one Mohd. Desa who was walking in a suspicious manner, examined him and found five plastic packets which they suspected to be heroin on his person. As a result of interrogation Mohd. Desa took Sgt. Yeoh to an eating stall at Magazine Road where he spoke to the appellant for a while. The appellant was taken to the Central Narcotics Bureau and interrogated. As a result of certain information from her, she led the police to premises No. 192 Batu Ferringhi where eleven packets of heroin, the subject matter of the charge, were recovered in a green bag placed in a room after she had unlocked the door with a key placed on a beam above the door. PW2 seized the packets and took possession of the padlock, key and a green folder containing an Australian passport and an air ticket belonging to the appellant. The bag was not taken possession of. The appellant was arrested and taken back to the Narcotics Bureau where subsequently a cautioned statement was recorded from her by Superintendent William Lim (PW4).

Several grounds of appeal were put forward and argued but I propose to deal with the important grounds.

The first ground alleged that the trial President erred in fact and in law in concluding that the appellant was in possession of the heroin and in doing so took into consideration the evidence of the appellant leading Inspector Latiff (PW2) to the discovery of the heroin in the room and stated "the fact of recovery to my mind cannot be ignored" after he had ruled out the admissibility of the alleged information leading to the discovery of the heroin under section 27 of the Evidence Act, 1950.

Now, it has been held by the Court of Appeal in *Tai Chai Keh* v. *Public Prosecutor*[1] that evidence that an accused person has pointed out objects or places to the police, is of little value and is often prejudicial to the accused, unless the information which led to the discovery is disclosed at the same time and therefore such evidence should always be received with great caution, especially in any case which is tried with the aid of assessors. At page 110 Spenser-Wilkinson J. said:—

"The evidence in the present case that the appellant pointed out the tree in which the revolver was hidden, could clearly be of no value unless and until it became known what had caused the accused to lead the police there. That evidence by itself might indicate that the accused desired to confess his guilt by showing to the police a firearm he had in his possession; but it might equally indicate that the accused intended to indicate somebody else's guilt...."

Facts discovered under section 27 of the Evidence Act embrace the place from which the heroin was produced and the knowledge of the appellant as to this, but do not include the objects recovered. (See Sarkar on Evidence, 12th Edition, page 296).

Information leading to the discovery must relate distinctly to the object so recovered and nothing more. Only so much of such information is admissible. Where such information is held to be inadmissible, the action of the accused which directly leads to such discovery in this case the act of the appellant in approaching the green bag and opening it, is of little value and ought to be treated with caution as it is prejudicial to the accused. Further, there was no indication one way or the other what had caused the appellant to lead the police there. Whether her intention was to confess her guilt or to indicate Mohd. Desa's guilt still remained uncertain. To my mind, since more than one inference has arisen, the inference in favour of the defence ought to be accepted.

The next ground was that the learned President relied on the testimony of the owner of the house

who rented the room to the appellant (PW3) to the effect that the appellant had exclusive use and control of the said room and that Mohd. Desa never stayed with the appellant in the said room. It was urged by defence counsel the failure of the police to record a statement from PW3 under section 112 of the Criminal Procedure Code vitiates the whole trial since the statement could not be made available to the accused at the trial in order to test the veracity of the witness's evidence in court with a view to impeaching his credit. Section 112(1) makes it incumbent upon a police officer making a police investigation to reduce a statement into writing after he has examined orally any person supposed to be acquainted with the facts and circumstances of the case. PW3 admitted that no statement was recorded from him and that he was never interrogated by the police. It was explained by the learned Deputy Public Prosecutor that the prosecution only made up their minds to call this witness after the learned President had ruled the information leading to the discovery under section 27 of the Evidence Act was inadmissible. Taking this into consideration, I am satisfied that Inspector Latiff (PW2) did not consider PW3 to be acquainted with the facts and circumstances of the case at the material time. Be that as it may, the effect of PW3's evidence does not brush away the probability of Mohd. Desa visiting the appellant in her room whenever PW3 was not in the house in the light of PW3's admission that sometimes he would be away from his house. The fact that she kept the key on the beam above the door and not on her person tends to indicate that she might have an intimate friend using the room.

In the next ground, considerable time was spent by the learned Deputy Public Prosecutor and defence counsel on the construction of section 37A of the Dangerous Drugs Ordinance. Since the learned President adopted the correct procedure in considering the two provisos (a) and (b), I do not propose to go into detail on the matter. All that I wish to point out is that a statement made under this section in relation to proviso (a) is in the nature of one made under section 24 of the Evidence Act. (See *Chandrasekaran & Ors.* v. *Public Prosecutor*[2]). The wordings in the two are *in pari materia*. In the inclusion of the proviso is the manifestation of the accepted standards of the rule of law incorporating sections 24 and 25 of the Evidence Act and the judge's rules. Even though the caution has been administered, an accused person may still retract his statement under proviso (a) on any of the grounds stated therein in accordance with the well-accepted principles and practice. It is then the duty of the trial court to hold a trial within a trial in order to decide whether the statement appeared to be caused by any inducement, threat or promise. The duty of proving that the statement was voluntary is on the prosecution. If it is held by the trial court to be admissible, it becomes part of the prosecution case.

The main ground here is that in admitting the statement which amounts to a confession the learned President failed to consider the possibility of inducement coming from Superintendent William Lim (PW4) by which the appellant agreed to plead guilty to possession of a relatively small amount of 16 grammes of heroin at the initial stage with a promise that she would be deported. It is unfortunate that the learned President did not consider this in his grounds although the point was raised in the appellant's evidence and submission by the learned defence counsel. All he said was that he was satisfied the caution had been properly administered, that there was no threat, inducement, or promise made to the accused at any time, and found as a fact that the statement was made voluntarily. He did not appear to appreciate the true meaning and intention of proviso (a), particularly the words "appears to the court". On record, the accused who was then unrepresented, pleaded guilty to the original charge for possession of 16 grammes of heroin, and subsequently when the charge was amended to possession of 92.910 grammes, she changed her plea and claimed trial on the advice of her counsel. The learned Deputy Public Prosecutor pointed out it was only after the receipt of the chemist report showing the true weight of the heroin that the charge was amended and that a charge for possession of any amount exceeding 5 grammes of heroin is punishable under the same section. That may be so. However, I cannot understand the reason for Inspector Latiff to have preferred a charge against the appellant for possession of merely 16 grammes when the original charge which ought to have been on the gross weight prior to the examination by the chemist should be more than 92.910 grammes. His explanation that it was only a rough estimate, coming from a police officer, cannot to my mind be reasonable, particularly so when Superintendent Lim in his testimony admitted that he never saw the exhibit himself as he trusted Inspector Latiff and that he only saw it on the day of the trial in court. What was the reason for such a careless attitude? Had the learned President put his mind to this matter, a grave suspicion would have arisen from the facts and surrounding circumstances. Apart from the untenable explanation by both police officers, Mohd. Desa was also arrested on the same day and five packets of heroin were found in his possession. No doubt, he was charged for possession but the weight of heroin is not known, as far as this case is concerned. The words "appears to the court" construed in its full and natural import embrace a well-grounded suspicion of inducement or threat reasonably based upon the facts and circumstances, and it is sufficient to exclude a confession if the making of it "appears to the court" to have been so caused. It seems to me from the facts and circumstances stated above a well-grounded suspicion that the statement made by the appellant could have been caused by inducement proceeding from PW4 cannot be ruled out.

The next ground with regard to the statement was whether the learned President failed to consider that it was true, apart from being voluntary. It was held by the Court of Appeal in *Abu bin Hussin* v. *Public Prosecutor*[3] that where an accused denied making certain statements recorded in the confession before a Magistrate, two entirely separate and distinct questions had to be considered in relation to the so-called confession: — (i) whether in fact the appellant did say the things he was said to have said, and (ii) whether or not these things were true. The jury should have been told that if they were satisfied the

appellant did make the statement they should then consider whether it was true and that they should do so by considering it in the light of the rest of the prosecution evidence and in the light of the different story told by the appellant in the witness box. In *Yaacob* v. *Public Prosecutor*,[4] the Federal Court held the question whether a statement is free and voluntary is a question of fact and must be decided on the evidence, both that tendered by the prosecution and that, if any, tendered by the accused. The accused person is entitled to have the verdict of the jury on the weight and value of the confession. In the present case, the learned President sitting alone is both judge and jury and should have borne in mind particularly whether or not the statement made by the appellant (Exhibit P12) was true and, if so, to consider giving whatever weight and value to the statement. The trial President should also caution himself that statements or confessions are not always true and that they must be checked in the light of the whole evidence on the record in order to see if they carry conviction. (*White* v. *The King*).[5]

In considering the statement being voluntary, the learned President noted that the style of language used in the statement was similar to the accused's style when she gave evidence in court. Subsequently, in considering the defence he concluded, in the light of the whole evidence, that the defence had not raised any doubt at all as to the truth of the prosecution story or the guilt of the accused. It may be argued that he had from the above put his mind to the question. However, he should have stated in clearer terms that he believed the statement to be true. With respect, his grounds seem to be rather sketchy and in some respects without mentioning any reasons for his conclusion. If the statement is properly scrutinised, the name of Megat mentioned by the appellant as the man who had purchased the heroin for her remains a mystery as there is nothing in evidence to show that Megat and Mohd. Desa are one and the same person. One would expect in normal circumstances for the recording officer (PW4) to have asked who this Megat was. Secondly, considering the amount of money of about $2,500 spent by the appellant and the large amount of heroin purchased should lead to the question whether she could have well afforded to purchase such a big amount for her own consumption during her short stay in Penang, in the light of the evidence that she was supposed to leave this country on April 9, 1976. Whether the learned President has considered all these points cannot be ascertained in view of the sketchy grounds. Now, an appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the Appellate Court are entitled to know the reasons for the finding. The trial court is under a statutory obligation under section 308 of the Criminal Procedure Code to transmit to the Appellate Court the grounds of decision which convey a reasoned judgment on the facts and on the law not merely the conclusion arrived at. The absence of reasons indicates the possibility that such probabilities of the case may not have influenced the vital consideration as the weight of evidence and the mental process of the trial judge in arriving at the ultimate finding. (See Ismail Khan J. (as he then was) in *Balasingham* v. *Public Prosecutor*).[6]

The last ground is that in considering the defence made by the appellant as her own witness, the learned President stated "Mohd. Desa was not even called up to explain this". What he meant by "this" is, I think, whether, as alleged by the appellant, Mohd. Desa had told her to help him in getting the heroin (Exhibit P12) which he had placed in the green bag in her room. The learned President did not appear to have accepted or believed her story. It is clear, to my mind, that the learned President required Mohd. Desa to be called as a defence witness to corroborate the appellant's story. I am unable to construe the words used by him to mean something else. Mohd. Desa was suppoenaed by the prosecution and made available for the defence at the close of the prosecution case. It is an accepted principle that there is no duty upon an accused person to call in evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other. (Spenser-Wilkinson J. in *Goh Ah Yew* v. *Public Prosecutor*).[7] The principle was followed by Winslow J. in Singapore in *Abu Bakar* v. *Regina*.[8] In that case the learned District Judge allowed himself to be swayed by the failure of the defence to call a witness and misdirected himself in requiring corroboration of the defence story. He did not go to the extent of using the presumption under illustration (g) of section 114 of the Evidence Act that if such evidence were produced it would be unfavourable to the accused. Even so, His Lordship was not satisfied that the learned District Judge did not draw an inference adverse to the defence story from the fact that a defence witness was not called. In *Tan Foo Su* v. *Public Prosecutor*,[9] Raja Azlan Shah J. (as he then was) held that failure of the defence to produce a particular witness must not be made a subject of adverse comment by the court, otherwise it would amount to a misdirection. Unlike the present appeal, the learned Magistrate made use of the presumption under section 114(g) of the Evidence Act unfavourable to the defence. Lastly, in *Roslan bin Karim & Ors.* v. *Public Prosecutor*,[10] Mohd. Azmi J. adopted the same principle on the ground that the trial President criticised the defence for not calling witnesses to substantiate their story.

I am not satisfied that the learned President in this case did not draw such an inference adverse to the defence from the fact that Mohd. Desa was not called to corroborate the defence story. If the learned President had not overlooked those authorities, I am sure he would not have misdirected himself on this point.

In the circumstances, I have no alternative but to allow the appeal and set aside the conviction and sentence passed against the appellant.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*